ORAL ARGUMENT SCHEDULED MARCH 21, 2019

Nos. 18-1161, 18-1182

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UPS GROUND FREIGHT, INC.,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 773,
Intervenor.

ON PETITION FOR REVIEW AND CROSS-PETITION FOR ENFORCEMENT OF ORDERS OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF OF PETITIONER/CROSS-RESPONDENT UPS GROUND FREIGHT, INC.

Kurt G. Larkin, Esq.
HUNTON ANDREWS KURTH LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
klarkin@huntonAK.com
(804) 788-8200

Counsel for Petitioner/Cross-Respondent, UPS Ground Freight, Inc.

Table of Contents

SUMMARY 1

ARGUMENT 4

I. The Board Mischaracterizes UPSF's Deference Arguments 4

II. The Board's Defense of the ARD's Handling of the R-Case is Without Merit 7

A. Mishandling of UPSF's Challenges to Frank Cappetta's Supervisory Status 7

i. UPSF Did Not Attempt to "Re-litigate" Frank Cappetta's Status 7

ii. The ARD Did Not Properly (or Timely) Address UPSF's Allegations of Taint 10

iii. Failure to Decide Cappetta's Supervisory Status Prior to the Vote 14

B. Conduct of Hearing & Denial of Reasonable Time to Prepare Closing Argument 16

C. The Ordering of a Mail Ballot Was Arbitrary 18

D. Refusal to Issue Subpoena Duces Tecum 22

E. The Accumulation of the ARD's Many Procedural Errors Plainly Prejudiced UPSF 23

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

Cases

AT&T, Inc. v. FCC,
886 F.3d 1236 (D.C. Cir. 2018).....18

Auer v. Robbins,
519 U.S. 452 (1997).....4, 5, 6, 17

Bay Area-Los Angeles Express,
275 NLRB 1063 (1985).....9

Burlington Truck Lines, Inc. v. U.S.,
371 U.S. 156 (1962).....1

Carey Salt Co. v. NLRB,
736 F.3d 405 (5th Cir. 2015).....9

Chamber of Commerce v. Brown,
554 U.S. 60 (2008).....21

Christensen v. Harris County,
529 U.S. 576 (2000).....7

Christopher v. SmithKline Beecham Corp.,
567 U.S. 142 (2012).....5

Dal-Tex Optical Co., Inc.,
137 NLRB 1782 (1962).....21

In re Dejana Industries, Inc.,
336 NLRB 1202 (2001).....12

Drukker Commc'ns, Inc. v. NLRB,
700 F.2d 727 (D.C. Cir. 1983).....22, 24, 25

GGNSC Springfield LLC v. N.L.R.B.,
721 F.3d 403 (6th Cir. 2013).....9

Indiana Hospital, Inc. v. NLRB,
10 F.3d 151 (3d Cir. 1993).....22, 24, 25

Jam Prods. v. NLRB,
893 F.3d 1037 (7th Cir. 2018) 23

Jicarilla Apache Nation v. U.S. Dep't of Interior,
613 F.3d 1112 (D.C. Cir. 2010).....24

Jochims v. NLRB,
480 F.3d 1161 (D.C. Cir. 2007).....1

L-3 Communications Eotech, Inc. v. U.S.,
83 Fed. Cl. 643 (2008).....25

Nat'l Ass'n of Mfrs. v. NLRB,
717 F.3d 947 (D.C. Cir. 2013).....21

NLRB v. CNN America, Inc.,
865 F.3d 740 (D.C. Cir. 2018).....1

NLRB v. Quinnipiac Coll.,
256 F.3d 68 (2d Cir. 2001) 8

NLRB v. Service Am. Corp.,
841 F.2d 191 (7th Cir. 1988) 23

Ozark Automotive Distributors, Inc. v. NLRB,
779 F.3d 576 (D.C. Cir. 2015).....22, 25

Perdue Farms, Inc.,
328 NLRB 909 (1999) 12

Rental Uniform Service, Inc.,
330 NLRB 334 (1999) 5

Rosewood Mfg. Co.,
263 NLRB 420 (1982) 21

Schwartz Partners Packaging, LLC,
362 NLRB No. 138 (2015) 3

SEC v. Chenery Corp.,
318 U.S. 80 (1943).....1

Shinseki v. Sanders,
556 U.S. 396 (2009).....24

Sitka Sound Seafoods, Inc. v. NLRB,
206 F.3d 1175 (D.C. Cir. 2000).....7, 15

United States v. Mead Corp.,
533 U.S. 218 (2001).....5

UPS Ground Freight, Inc.,
365 NLRB No. 113 (2017) 3, 5, 9, 12, 25

Warner v. Kmart Corporation,
2009 U.S. Dist. Lexis 44502 (D.V.I. May 27, 2009) 9

In Re Watkins Sec. Agency of DC, Inc.,
357 NLRB 2337 (2012) 6

Statutes

29 U.S.C. §158(c) 20, 21

Administrative Procedure Act, 5 U.S.C. §§500 et seq 21

Other Authorities

29 C.F.R. §102.64(c).....17

29 C.F.R. §102.66(h) 16

29 C.F.R. §102.67(g) 5

NLRB Casehandling Manual, Part Two: Representation Proceedings

§11020.....11

§11028.1.....12

Representation-Case Procedures, 82 Fed. Reg. 58783(proposed Dec. 14, 2017)(to be codified at 29 CFR Parts 101 and 102)).....2

GLOSSARY OF ABBREVIATIONS

ARD ..... Acting Regional Director of NLRB Region 4

Board/NLRB ..... National Labor Relations Board

B.Br. ..... NLRB's Brief

O.Br. ..... UPS Ground Freight, Inc.'s Opening Brief

Rule/Final Rule ..... Representation Case Procedures
29 C.F.R Parts 101-103,
79 Fed. Reg. 74308

Union ..... International Brotherhood of Teamsters, Local 773

UPSF/Company ..... UPS Ground Freight, Inc.

Record Citations

COR ..... Supplemental Decision on Objections and
Certification of Representative, March 11, 2016

D&D ..... Decision and Direction of Election
January 5, 2016

Offer ..... UPS Ground Freight's Offer of Proof
February 16, 2016

SOP ..... UPS Freight's Statement of Position
December 18, 2015

Tr ..... NLRB Hearing Transcript
December 21, 2015

SUMMARY

The Board's opposition brief abounds with criticism of everything from UPSF's legal arguments to its supposed motive in bringing this appeal. The Board's acerbic strategy is unsurprising; it is defending an administrative record almost totally lacking in rationally explained decision-making.

The Board seeks to make up for the absence of record justification for so many of the challenged rulings by supplying justifications of its own. Time and again, it defends the ARD's rulings with rationale found nowhere in the rulings themselves. Yet it is hornbook law that "courts may not accept appellate counsel's post hoc rationalizations for agency action," and agency discretionary orders must "be upheld, if at all, on the same basis articulated in the order by the agency itself." *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962); *see also, e.g., NLRB v. CNN America, Inc.*, 865 F.3d 740, 751 (D.C. Cir. 2018)(*quoting SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943))("[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based"); *Jochims v. NLRB*, 480 F.3d 1161, 1170 (D.C. Cir. 2007)("[O]f course we will not credit" argument raised for first time in Board's appellate brief).

Much of the Board's brief is just that: after-the-fact rationalization by appellate counsel seeking to justify the agency's unexplained, and in many cases,

unexplainable, actions. *See, e.g.*, B.Br. 31; 32-35; 46-47; 50; 53; 54-55. UPSF respectfully submits that the Court must focus on the justifications in the agency record, not those the Board advances for the first time on appeal.

The Board also engages in unwarranted "table-pounding," questioning UPSF's motivations and even characterizing its legal challenges as worthy of sanction. B.Br. 38. The Court should see through this smokescreen. Suggesting the Company has no legitimate basis for seeking review of a decision the Board itself has cited as potential justification for amending the Final Rule is insincere, not to mention telling. *See* Representation-Case Procedures, 82 Fed. Reg. 58783, 58784 (proposed Dec. 14, 2017)(to be codified at 29 CFR Parts 101 and 102) (citing *UPS Ground Freight, Inc.*, 365 NLRB No. 113 (2017))("numerous cases litigated before the Board have presented significant issues concerning application of the Election Rule").[1]

Moreover, the Board's insinuation that UPSF has taken this appeal simply to "delay bargaining with the Union," B.Br. 56, is paradoxical. As its own former Chairman pointed out, it was ***the Board*** that created delay by refusing to review UPSF's procedural challenges:

[1] Of the hundreds of representation cases conducted since the Final Rule's enactment, this case is one of only four cited by the Board in seeking public comment on whether the Rule should be retained, modified or rescinded altogether. *Id*.

> [B]ecause my colleagues deny review on most issues the Employer raises, the parties here—and most parties in other election cases—will never obtain a definitive resolution from the Board as to the issues the Board does not address, and any meaningful postelection review will only be available in the courts, which defeats the purpose of mandating that elections occur on the 'earliest date practicable.'

UPS Ground Freight, Inc., slip op. 6 (2017) (Miscimarra, dissenting).

The Board is well aware the only way an employer can seek review of findings in an election case is through a "technical" refusal to bargain which may be reviewed in court. *See, e.g., Schwartz Partners Packaging, LLC*, 362 NLRB No. 138 (2015)("[T]o preserve its right to challenge the Union's certification, the Respondent was required to avail itself of the well-established test-of-certification procedures, namely, refusing to bargain and later defending against the resulting refusal-to-bargain complaint by asserting an affirmative defense that the certification was improper"). Had the Board chosen to accept review and provide meaningful analysis of the rulings at issue, the case might already be concluded. Accusing the Company of intentional delay for pursuing the only available avenue for legal review of challenges the Board itself refused to address is disingenuous.[2]

[2] The implication that UPSF (which, along with its affiliates, are the largest employers of Teamster labor in the United States) has an anti-union motive for this appeal, B.Br. 15; 38, is particularly curious. The Union never accused UPSF of unfair labor practices during the election campaign. More to the point, UPSF's concern all along has been the prejudicial manner in which the ARD applied the Final Rule in this case. The Board knows that, and should know better.

Regardless, the Board fails to identify sufficiently reasoned justification *in the record* to permit enforcement of its Order.

ARGUMENT

I. The Board Mischaracterizes UPSF's Deference Arguments

The Board concedes it receives no deference under *Auer v. Robbins*, 519 U.S. 452 (1997) for its application of unambiguous rules, but misconstrues UPSF's arguments on this point. UPSF has not "explicitly limited" its defense to the question of whether the ARD's application of unambiguous rules constitutes an abuse of discretion. B.Br. 43. To be sure, one of the Company's primary contentions is that the ARD applied unambiguous provisions in the Final Rule unfairly. But UPSF also argues that if the Court *does* find ambiguities in the Rule, the Board's proffered interpretations still are not entitled to deference. O.Br. 23-28. This is not an academic distinction. The Board—albeit after-the-fact—offers at least one reading of the Final Rule that directly contradicts the Company's. Compare B.Br. 50 with *infra* 16-18.

The Board must know this. Despite arguing there is no regulatory ambiguity for the Court to decipher, it challenges UPSF's assertion that the ARD's rulings do not qualify for deference because they were not reviewed by the Board. While accusing UPSF of "ignoring the law" on this point, B.Br. 43, it is the Board that fails to acknowledge that the Supreme Court has limited *Auer* where regulatory

interpretations do not "reflect the agency's fair and considered judgment on the matter in question." *Christopher v. SmithKline Beecham Corp*., 567 U.S. 142, 154 (2012). The Board also fails to acknowledge the parallel rule that low-level agency rulings carrying no "force of law" are not entitled to "*Chevron*-style" deference. *United States v. Mead Corp*., 533 U.S. 218 (2001). Finally, the Board does not dispute the fact that Regional Directors' decisions are not precedential. *Rental Uniform Service, Inc*., 330 NLRB 334, 336, n. 10 (1999).

Instead, the Board claims only that it "expressly affirmed the Regional Director's rulings in this case," B.Br. 43, perhaps insinuating that if the Court finds regulatory ambiguities, it can apply *Auer* because the full Board has weighed in. The Board's position is not just incorrect, it is revisionist history. The Board *denied* review of UPSF's Final Rule challenges: "We disagree with the dissent that review is warranted of the Hearing Officer's and Acting Regional Director's procedural rulings, which were well within their discretion to make." *UPS Ground Freight, Inc*., slip op. 1, n. 1.

That is not an "affirmance," at least not to the extent it entitles the Board to deference under *Christopher* and *Mead*. The Board's own rules provide that a denial of a request for review constitutes an *administrative* affirmance. *See* 29 C.F.R. §102.67(g). But unless the Board grants review and adopts the Regional Director's regulatory interpretations, those interpretations do not become

precedential. *In Re Watkins Sec. Agency of DC, Inc*., 357 NLRB 2337, 2338 (2012). Denied requests for review, therefore, do not reflect the Board's fair and considered judgment. And this one surely does not: the Board offered no analysis of its own in its one-sentence denial of review on these issues.

The Board cannot have it both ways—it cannot deny review of a Regional Director's decision, leaving it without precedential force, then seek deference when questions arise as to regulatory assumptions and interpretations contained in that decision. That is precisely what the Board tries to do here, all while denying that *Auer* applies. To the extent the Court finds the parties' respective arguments implicate ambiguities in the Final Rule, it should not give the Board's arguments *Auer* deference.

Ironically, the parties end up in roughly the same place: the Court need only review the challenged rulings for abuse of discretion. That inquiry, though deferential, is not the same thing as extending deference under *Auer*. Under the former standard, the Court need not accept the Board's claim that it has sufficiently justified its rulings. As explained throughout, it has not.[3]

[3] The Board also claims UPSF "misrepresents" that many of the ARD's rulings are based on the GC Memo and not the Final Rule. B.Br. 44. UPSF is not misrepresenting anything. [*See, e.g*., JA0793] (citing GC Memo to justify ruling on postponement motion); [JA0794] (citing GC Memo to justify denial of post-hearing briefs); JA0795] (citing GC Memo to justify refusal to rule on Cappetta's status prior to election). Since these rulings are based on regulatory interpretations

II. The Board's Defense of the ARD's Handling of the R-Case is Without Merit

A. Mishandling of UPSF's Challenges to Frank Cappetta's Supervisory Status

i. UPSF Did Not Attempt to "Re-litigate" Frank Cappetta's Status

The Board is wrong to accuse UPSF of taking a "second bite at the apple," B.Br. 30-31, by offering additional evidence of Frank Cappetta's supervisory status in its post-election offer of proof. Its contention that UPSF sought a post-election hearing to challenge Cappetta's conduct, but not his status, is a red herring. There was no supervisory finding to challenge at that point because the ARD had not yet issued one. The question was still up in the air at the time UPSF submitted its election objections.

Thus, the Board's citation to *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175 (D.C. Cir. 2000), does not support its "one bite" argument. There, this Court merely acknowledged the well-known principle that a party may not re-litigate issues from a representation proceeding in a subsequent unfair labor practice proceeding, absent "newly discovered evidence or other special circumstances." *Id*. at 1182. UPSF did not seek to re-litigate Cappetta's status in a subsequent unfair labor practice proceeding. Moreover, UPSF's offer of proof—submitted

---

contained in the GC Memo, they do not qualify for "*Chevron*-style" deference. *Christensen v. Harris County*, 529 U.S. 576, 588 (2000).

during the course of the representation proceeding and before any decision on Cappetta's status was formally announced—*does* contain new evidence regarding the scope of his supervisory authority. Even if the evidence were not new and different from UPSF's hearing proofs, "special circumstances" clearly exist in the highly prejudicial manner in which the ARD conducted the representation proceeding and arbitrarily restricted UPSF's attempt to put on its evidence. The Board's response to this is risible. The "opportunity" UPSF was given to present its case cannot barely be described as "ample." B.Br. 31.[4]

What the Board refuses to acknowledge is that the offered proof tended to establish Cappetta's supervisory status. Drivers could not refuse Cappetta's dispatch assignments and could be disciplined if they did. [JA0776-0777]. These facts directly contradict the Board's finding that Cappetta lacked authority to require employees to follow his assignments and strongly suggests he could indeed "assign" work under the NLRA. *See, e.g., NLRB v. Quinnipiac Coll.*, 256 F.3d 68, 75 (2d Cir. 2001) (shift supervisors who were not involved in initial assignments, but could override employee assignments and redistribute work, were supervisors

[4] The very existence of the additional evidence in UPSF's offer of proof belies the contention that denial of its requests to continue the hearing by two days, and to adjourn the hearing to a second hearing day, did not compromise UPSF's ability to marshal all of its evidence within the time provided before, and during, the December 21, 2015 hearing. These procedural infirmities frustrate any substantive consideration of Cappetta's supervisory status on the present record.

under the Act); *Warner v. Kmart Corporation*, 2009 U.S. Dist. Lexis 44502 (D.V.I. May 27, 2009)(evidence plaintiff could effectively recommend corrective action against subordinates for refusing to run a cash register establishes he could assign work under the Act); *cf. GGNSC Springfield LLC v. N.L.R.B.*, 721 F.3d 403, 409 (6th Cir. 2013) (vacating order where Board failed to consider evidence nurses could impose discipline and therefore qualified as supervisors).[5]

Ultimately, the Board chose not to address UPSF's offer of proof and never analyzed whether the ARD's decision not to consider it was valid. Accordingly, Board counsel's post-hoc characterizations of its evidentiary value, *see* B.Br. 31, should be disregarded, and the Board's conclusion Cappetta was not a supervisor cannot be enforced. *See Carey Salt Co. v. NLRB*, 736 F.3d 405, 410 (5th Cir. 2015)("[A] decision by the Board that ignores a portion of the record cannot survive review under the substantial evidence standard")(internal citations omitted).[6]

---

[5] The case primarily relied on by the Board to justify its determination on review that Cappetta was not a supervisor found the opposite with respect to the dispatcher at issue there. *See UPS Ground Freight, Inc*., slip op. at 2 (citing *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1075-76 (1985)("Although [employee] suggests that drivers reload their trucks if he observed that freight was improperly loaded so that it was in danger of being damaged, there is no evidence that the drivers faced disciplinary action if they refused to do this")).

[6] The Board misconstrues other evidence of Cappetta's supervisory status. For example, its contention that Cappetta's role in scheduling temporary drivers to fill in for absent UPSF drivers was rescinded prior to the hearing, B.Br., 28 n. 2, is

ii. The ARD Did Not Properly (or Timely) Address UPSF's Allegations of Taint

The Board's defense of the ARD's handling of the "supervisory taint" question is a study in obfuscation. It is the Board that "confuses distinct aspects" of a representation proceeding, B.Br. 36, in its effort to mask the shortcomings in the ARD's rulings on this issue.

UPSF does not make the "extraordinary suggestion" that the ARD should have "affirmatively sought out evidence" to support the Company's *post-election*

---

not supported by the record. Instead, the record reflects Cappetta still possessed that authority at the time of the hearing. Matt Dibiase confirmed that no one told Cappetta how much work to assign to temporary drivers on a given day: "He would make those calls on his own." [JA0141]. Dibiase also confirmed that even after he became Kutztown Operations Manager and assumed responsibility for assigning work to UPSF's partner entity, Coyote, Cappetta continued to assign routes to outside contractor Yesik on his own: "[I]f it's Yesik, then he -- he'll take care of that." [JA0186]. Cappetta himself confirmed the same thing:

> HEARING OFFICER O'NEILL: And in the past year have you ever been the one to contact Yesik to request additional drivers?
>
> THE WITNESS: Yes.
>
> HEARING OFFICER O'NEILL: And how often have you been the one to make the contact?
>
> THE WITNESS: Well, since for about the last six months through -- through the direction of Paul Dalessandro; he's given me that and said, hey, if you need Yesik, just you can make that phone call.
>
> HEARING OFFICER O'NEILL: So you don't -- you don't have to send an email to Paul -- to Dallesandro each time?
>
> THE WITNESS: Right now currently? Not anymore, no, because he's just -- he's telling me to, hey, get the job done and get the load covered, you know what I mean?

[JA0231].

objections. B.Br. 36. UPSF has never contended the Board must assist an employer in gathering post-election objections proof. To the contrary, UPSF raised two parallel concerns at the outset of the case which should have required *pre-election* action by the Region: (i) Frank Cappetta was a statutory supervisor ineligible to vote in the election, and (ii) Cappetta campaigned for the Union, potentially invalidating its showing of interest.

UPSF presented substantial evidence in its SOP indicating Cappetta was a statutory supervisor, [*see* JA0541-0543], and raised the supervisory taint issue while acknowledging it was unable to submit direct evidence of Cappetta's Union solicitation within the SOP deadline (while objecting to that deadline). [*See* JA0555-0558]. For that reason, UPSF proposed that the Region check the Union's showing of interest to see whether Cappetta had participated as a witness in Union card signings. *Id*. The Region already was obligated to verify the showing of interest, a requirement in every representation case. *See* CHM, Part Two, §11020 ("It is essential that a check of the adequacy of the showing of interest (Sec. 11030) be performed in every case shortly after the filing of the petition, in order that issues concerning the showing of interest will be resolved before the case progresses beyond the initial stages").

UPSF therefore was not asking that the Region do anything beyond what the Casehandling Manual already obligated it to do. Given UPSF's SOP evidence

indicating Cappetta was a supervisor, it stands to reason the Region should have considered Cappetta's status and determined whether his name appeared as a witness on Union cards, *before* voting took place.

Shortly after filing its SOP, UPSF proffered objective evidence supporting its second contention—that Cappetta campaigned for the Union. [*See* JA0664].[7] At that point, notwithstanding its general obligation to verify the Union's showing of interest, the Board was obligated to investigate the possibility of taint. *See Perdue Farms, Inc*., 328 NLRB 909, 911 (1999); CHM, Part Two, §11028.1.

The Board does not appear to dispute that "if a supervisor directly solicits authorization cards, those cards are tainted and may not be counted for the showing of interest." *In re Dejana Industries, Inc*., 336 NLRB 1202 (2001). But there is no indication such an investigation ever occurred.

In this regard, it is surprising that the Board repeats the ARD's assertion that he actually did conduct an "administrative investigation," in which he "reasonably

[7] The Board's characterization of this evidence, B.Br. 32-35, is post-hoc argument the Court should disregard on review. The ARD never even considered, much less characterized, the Company's proffer, at any point. In its decision on review, the Board did briefly address UPSF's taint allegations. *See UPS Ground Freight, Inc*., slip op. at 3. But the Board considered only whether Cappetta's conduct was objectionable, not whether it tainted the showing of interest and/or whether UPSF's pre-hearing proffer was sufficient to warrant a check of authorization cards. The Board also failed to analyze UPSF's contention that it was arbitrarily denied the opportunity to subpoena additional evidence of Cappetta's pro-union solicitation to include in its post-hearing offer of proof.

concluded" Cappetta was not a supervisor. B.Br. 37. In other words, the Board essentially admits the ARD never looked into UPSF's taint allegations. As it must, given the ARD's own admission: "the Region conducted an investigation on this issue . . . and determined that Cappetta is not a statutory supervisor; *therefore, the Region found that there was no taint*." [JA0797] (emphasis added).[8]

The validity of the Board's "investigation" of UPSF's taint allegations therefore depends entirely on its parallel conclusion that Cappetta was not a supervisor—a conclusion reached in error and without considering UPSF's offer of proof. If the Court rejects (or remands) the Board's ruling on Cappetta's supervisory status, it must also reject its assertion that the ARD properly handled UPSF's taint allegations.

It is partly because of these inadequacies that UPSF's *post-election* objections assert the ARD failed to investigate or resolve the taint allegations raised in the Company's SOP. [JA07612-0762]. Ultimately, its contention is that the ARD's failure to address both Cappetta's supervisory status and the taint question before the vote constituted an abuse of discretion that harmed the Company during the election campaign and allowed the certification of a Union

[8] UPSF's offered proof—that the Region failed to contact bargaining unit employees regarding Cappetta's involvement in card signings, and failed to speak with Tammy Cadman, who would have testified that Cappetta admitted he was trying to organize the Kutztown facility—bears this out. [JA0778-0779].

under circumstances where the showing of interest may well have been obtained through supervisory taint. While UPSF made—and preserved—these arguments from the very outset of the case, it was not inappropriate to raise them again in its objections to the conduct of the election.

The Board additionally suggests its failure to investigate these issues is not "relevant to any post-election question," and that the validity of a showing of interest is "not subject to litigation at any stage." B.Br. 38. But UPSF is not asking the Court to parse the showing of interest—that time is long past. The Company's point is that the ARD's failure to properly address these issues—timely raised in UPSF's SOP and followed shortly thereafter by a pre-hearing offer of proof—was an abuse of discretion that fatally compromised election conditions. This is most certainly a "post-election question" inasmuch as it supports UPSF's assertion that the resulting unfair labor practice Order is unenforceable.

iii. Failure to Decide Cappetta's Supervisory Status Prior to the Vote

Finally, the Board asserts the ARD was "not required" to decide Cappetta's supervisory status prior to the vote and that UPSF was "not entitled" to a pre-election finding on this issue. B.Br. 40. The Board misses the point. It is undisputed that under the Final Rule, Regional Directors are not "required" to decide supervisory status questions before an election. The Final Rule, however, plainly vests them with the discretion to do so.

Here, the circumstances called for a pre-election decision on Cappetta's status, and the ARD's failure to do so was an abuse of discretion. His non-decision is all the more puzzling given that he accepted some evidence on Cappetta's status—at least, as much as UPSF could muster after being rushed into an arbitrarily abbreviated one-day hearing. In that case, almost anyone would ask, *why not decide*? Answering simply that "he doesn't have to," and that uncertainty about these things is "inevitable," is not reasoned justification. [JA0795].

The Board retorts that deferral of this question did not harm UPSF. B.Br. 40-41. But its own caselaw belies that assertion. In *Veritas Health Services, Inc. v. NLRB*, this Court enforced an election certification despite the presence of pro-union coercion by two individuals alleged to be supervisors. 671 F.3d 1267, 1273 (D.C. Cir. 2012). The Court noted that after the employer promoted these individuals, "they [then] actively campaigned *against* the Union in the run-up to the election." *Id*. (emphasis in original). The Court held their employer advocacy mitigated their prior, pro-union coercion: "Indeed, any [employees] who felt pressured by [the supervisors] would have felt coerced to vote *against* the Union." *Id*. (emphasis in original). Thus, the Court recognized that a supervisor's recantation of prior, pro-union advocacy, and adoption of a more pro-employer stance, can dramatically impact the result of the election.

Here, the ARD's refusal to rule on Cappetta's status before the vote produced the opposite outcome. His decision foreclosed UPSF's legal right to insist that Cappetta likewise disavow the Union and support the Company during the campaign. If the supervisors' "change of heart" in *Veritas* was determined by the Court to be so significantly influential on employees that it could *legally mitigate* the supervisors' prior pro-union coercion, denying UPSF the same opportunity with Cappetta based solely on the (arbitrary) notion that a pre-election ruling on his status "would not give the Company the certainty that it demands," B.Br. 41, plainly constitutes prejudicial error.

B. Conduct of Hearing & Denial of Reasonable Time to Prepare Closing Argument

The Board's defense of the Hearing Officer's and ARD's handling of UPSF's requests for additional time is unpersuasive. Regarding the denial of UPSF's request for time to prepare its oral argument, the Board argues the Rule affords parties a "'reasonable period' to ***present*** the closing statements," but not to prepare them. B.Br.50. The Board is wrong; the Rule does not say this. It states parties shall receive a "reasonable period at the close of the hearing ***for*** oral argument." 29 C.F.R. §102.66(h)(emphasis added). According to the Board's former General Counsel, this provision gives parties the right to prepare: "At the close of hearing, parties are permitted to make oral arguments on the record. The

hearing officer will provide parties a reasonable period of time ***to prepare*** their oral arguments." GC Memo at 24 (emphasis added).

The Board thus ignores its own General Counsel's reading of the Rule. If it insists on its contrary reading, the Board's interpretation receives no *Auer* deference. *See infra* 5-7; O.Br. 23-27. Regardless, the Board's interpretation gets no deference anyway because it is post-hoc argument. The Hearing Officer and ARD did not include the Board's asserted rationale when denying UPSF's requests for adequate time to prepare argument. [JA0794; JA0329-0333].

In any case, as interpreted by the GC Memo, the Rule plainly affords parties a "reasonable" period to prepare closing argument. Under the circumstances, UPSF's request for an overnight adjournment was more than reasonable, and the ARD's decision—reached off the record and without any explanation—to restrict the Company to a mere thirty minutes at the end of a long hearing day plainly constituted an abuse of discretion.

The ARD also erred by denying UPSF an overnight adjournment to marshal additional evidence. This conclusion is evident given the Final Rule's provision regarding the continuation of hearings generally. *See* 29 C.F.R. §102.64(c) (hearings "***shall*** continue from day to day until completed unless the regional director concludes that extraordinary circumstances warrant otherwise")(emphasis added). The GC Memo notes that a "party's request to gather additional evidence

typically would not meet the standard of 'extraordinary circumstances,'" GC Memo 23, meaning that Regional Directors should not allow a continuance *to a non-consecutive day* just so a party can develop additional evidence. But UPSF did not ask for anything more than an overnight adjournment. Given the frantic pace of the R-Case to that point, and the ARD's partial denial of UPSF's request for more time to prepare, it was an abuse of discretion for the ARD to then insist that UPSF complete the hearing long after-hours and in a single day. There was no reason to rush the hearing to premature conclusion, especially when the ARD then took over two weeks to issue the D&D.[9]

C. The Ordering of a Mail Ballot Was Arbitrary

This Court has held—in cases the Board cites—that an agency must "articulate a rational connection between the record and the agency's decision." *AT&T, Inc. v. FCC*, 886 F.3d 1236, 1245 (D.C. Cir. 2018). The ARD's mail ballot analysis does not meet that standard.

The Board fails to acknowledge that the ARD's mail ballot decision was based on assumptions not reflected in the record. While there was some evidence regarding the distance covered by drivers during their delivery routes, the ARD's

[9] The Board's assertion that UPSF requested adjournments "for the sole purpose of presenting closing statements," B.Br. 49, ignores UPSF's offer of proof, in which two Company representatives offered to testify regarding the Hearing Officer's off-the-record "refusal of requested adjournments to complete live witness testimony the following morning." [JA0774].

concern that "traffic and weather conditions" might "hinder employees from returning to the Employer's facility in time to permit them to vote," [*see* JA0680], is mere speculation. The Board points to nothing in the record suggesting drivers are frequently stuck on the road, much less that they often experience delays returning to the Kutztown facility after completing their delivery runs.

The ARD's ruling was also based on a fundamental misunderstanding of UPSF's election proposals—a factor the Board leaves unaddressed in its brief. The ARD's conjecture about traffic and weather led him to conclude drivers may be prevented "from *returning* to the Employer's facility in time to permit them to vote." [JA0680] (emphasis added). But UPSF proposed both at the hearing, and again in its revised proposal, to arrange the dispatch so that all drivers could vote at the terminal *before leaving on their assigned routes*. [JA0316-0317; JA0691-0693]. There was never any contention—and no record evidence suggesting—drivers travel "long distances" from their homes to the Kutztown facility to *begin* their shifts. B.Br. 52; [JA0680]. Thus, UPSF's proposals eliminated any possible concerns—however speculative they may have been—about drivers being stuck on the road during their shifts and missing the voting times. The Board fails even to acknowledge, much less explain, this disconnect.

Regarding the ARD's refusal to consider UPSF's revised election proposal, the Board argues that changing the election details might have risked "sowing

confusion" among voters since the notice of election had "already been sent to the parties." B.Br. 53. This too is wrongheaded speculation. Ballots were not scheduled to be mailed until January 11, 2016, four days after UPSF made its revised proposal. Thus, the ARD easily could have modified this election detail and issued a revised notice calling for a manual election without "confusing" employees.

Finally, the Board asserts that UPSF is "foreclosed" from demonstrating prejudice because "thirty out of thirty-two eligible voters ultimately cast ballots." B.Br. 53. This observation misses the point. UPSF was prejudiced because the ARD's arbitrary ruling essentially foreclosed the Company's legal right to continue holding group campaign meetings once the ballots went out on January 11, 2016. Had he ordered a manual ballot, UPSF would have been allowed to continue group meetings up until 24 hours before the vote, which clearly would have been later than January 11th given the timing of the ARD's ruling.

To this contention, the Board claims UPSF's "purported" rights under Section 8(c) of the NLRA are not implicated by the mail ballot decision or even relevant in a representation case. B.Br. 54. The Board is way off the mark. UPSF enjoys a statutory right to engage in non-coercive speech during a representation case, or at any time. *See* 29 U.S.C. §158(c). Indeed, Section 8(c)'s enactment "is indicative of how important Congress deemed such 'free debate' that Congress

amended the NLRA rather than leaving to the courts the task of correcting the NLRB's decisions on a case-by-case basis." *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008). The Company's Section 8(c) rights clearly are capable of being infringed. *See, e.g.*, *Id*. at 68-69 (state statute barring grant recipients from using funds to assist, promote or deter union organizing interferes with employers' Section 8(c) rights and is "unequivocally" preempted); *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 959 (D.C. Cir. 2013)(rejecting Board rule that made failure to post notice of right to organize an unfair labor practice, because such a rule violated employer rights under Section 8(c)).[10]

Moreover, the Board misses the point of UPSF's objection. The Company is not affirmatively "enforcing" its rights under Section 8(c). Instead, its contention is that a Regional Director abuses his discretion under the APA by ruling in a manner that unduly interferes with an employer's exercise of that right. That clearly happened here, and the Board's cavalier dismissal of the significance of this

[10] The Board's citation to *Rosewood Mfg. Co*., 263 NLRB 420 (1982) is not to the contrary. The Board there simply held that, notwithstanding Section 8(c)'s provision that non-coercive employer speech cannot be an unfair labor practice, such speech might nevertheless interfere with the "laboratory conditions" required for a valid election. *See, e.g., Dal-Tex Optical Co., Inc*., 137 NLRB 1782, 1787 (1962)(cited by *Rosewood Mfg. Co*., 263 NLRB at 420)("the test of conduct which may interfere with the 'laboratory conditions' for an election is considerably more restrictive than the test of conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1)"). The Union never accused UPSF of violating laboratory conditions during the election period.

right is at odds with Congress' express protection of free debate in representation campaigns.[11]

D. Refusal to Issue Subpoena Duces Tecum

The Board's contention that the ARD correctly refused to issue document subpoenas is meritless. For one thing, the Board is wrong to prejudge the relevance of UPSF's reasons for requesting the subpoenas. B.Br. 39-40. This Court and other appellate courts have refused to enforce Board election orders where the Board disallowed subpoenas for similar information. *See, e.g., Ozark Automotive Distributors, Inc. v. NLRB*, 779 F.3d 576, 584 (D.C. Cir. 2015)(subpoenaed information on phone calls between employees and the union "relate to a matter in question . . . and the documents may have provided leads to other relevant evidence")(emphasis added); *Drukker Commc'ns, Inc. v. NLRB*, 700 F.2d 727 (D.C. Cir. 1983)(Scalia, J.) (Board's refusal to permit employer to subpoena a witness in proceeding challenging validity of election was prejudicial error); *Indiana Hospital, Inc. v. NLRB*, 10 F.3d 151 (3d Cir. 1993)(Alito, J.) (revoking subpoena for phone records between NLRB staff members and bargaining unit employees harmed employer in several ways: (i) employer could

[11] The Board further contends UPSF could have campaigned in other ways and that it had plenty of time to do so. B.Br. 54-55. Notwithstanding whether there is any veracity to this rationale, it is absent from the ARD's rulings. The Court therefore must disregard it. The ARD based his finding that UPSF was not prejudiced solely on the fact that almost all eligible voters cast ballots. [JA0796].

have introduced records in evidence; (ii) it could have identified employees the Board had contacted, and (iii) it could have used the records in examining employees).

As for the claim the ARD lacked authority to issue subpoenas in the absence of a hearing notice, B.Br. 38-39, the Board is subjecting UPSF to a classic "Catch-22." The Board ignores UPSF's primary contention, which is that the claimed lack of subpoena power in the absence of a notice of hearing is precisely why the ARD abused his discretion by refusing to hold a hearing on the Company's taint allegations. This is especially so given his admission that he never investigated them before the election. As the Seventh Circuit has aptly noted, "[t]he whole purpose for the hearing is to inquire into the allegations to determine whether they are meritorious; it makes little sense to expect the employer to prove its case, especially without power of subpoena, to the Regional Director before a hearing will be granted." *Jam Prods. v. NLRB*, 893 F.3d 1037, 1045 (7th Cir. 2018)(quoting *NLRB v. Service Am. Corp*., 841 F.2d 191, 197 (7th Cir. 1988)).

E. The Accumulation of the ARD's Many Procedural Errors Plainly Prejudiced UPSF

The Board claims UPSF's appeal fails because it cannot show that any of the ARD's decisions resulted in prejudice. The Board is wrong yet again. For one thing, UPSF has adequately demonstrated that many of the ARD's rulings directly restricted its ability to prepare and/or put on its pre-hearing case and to campaign

effectively during the pre-election period. UPSF's showing of prejudice is more than sufficient. *See, e.g., Jicarilla Apache Nation v. U.S. Dep't of Interior*, 613 F.3d 1112, 1121 (D.C. Cir. 2010)("If prejudice is obvious to the court, the party challenging agency action need not demonstrate anything further"); *cf. Shinseki v. Sanders*, 556 U.S. 396, 410 (2009)(APA's harmless error standard merely requires showing of prejudice, which is not a "particularly onerous requirement").

The Board's no-prejudice analysis is also presumptuous. It fails even to acknowledge the possibility that the outcome may have been different had the ARD given UPSF additional time to prepare its pre-hearing case; to return for a second hearing day, even if only to submit Company documents the Hearing Officer herself requested be produced; to have more than thirty minutes to prepare an oral argument after a long hearing day, or to submit a post-hearing brief. Saying none of this matters because UPSF had the right to request Board review, B.Br. 51, ignores the fact that the ARD's initial decisions on the substantive issues may well have been different had the Company's requests not been summarily denied. More importantly, that is not how this Court analyzes claims of prejudice:

> As experienced trial attorneys know, when a hostile witness realizes that examining counsel has information bearing on the answers to counsel's questions, the witness tends to be more candid. Here, the company was deprived of this incentive for truthful and complete testimony. In saying this we are of course assuming that the documents, if disclosed, would have supported the company's claim . . . But it seems to us that *Drukker* and *Indiana Hospital* made the same sort of assumptions when determining that the errors in those

> cases were prejudicial. In *Drukker*, the court could not be sure what sort of testimony would have been given if the subpoena had issued. And in *Indiana Hospital* the court could not be certain what the documents would have revealed if the subpoena had not been quashed.

Ozark Automotive, 779 F.3d at 585. In this vein, the Company cannot be expected to articulate exactly what would have been different if its requests had been granted, because it cannot know how the ARD would have ruled.

Finally, the Board's analysis of prejudice is fundamentally flawed inasmuch as it isolates each of the ARD's challenged rulings and analyzes them in a vacuum. The Board ignores their cumulative effect on the overall tenor of the proceedings. Chairman Miscimarra noted this concern in his dissent:

> ***At some point*** . . . a party's substantive rights to litigate its case in Board proceedings are infringed upon by (i) dramatically accelerating litigation timetables; (ii) denying reasonable requests for modest extensions of time; (iii) giving the party a mere 7 days (extended here by one business day) to prepare a comprehensive Statement of Position; (iv) giving the party a mere 8 days (also extended here by one business day) to prepare and present testimony and documentary evidence in a hearing; (v) requiring a party to participate in the hearing for an extended period of time, on a single day, beyond normal business hours; (vi) denying a party's request to adjourn the hearing, at roughly 7 p.m., in order to permit the party to prepare its oral argument overnight; and (vii) giving a party a mere 30 minutes, at the end of a long hearing day, to prepare its oral argument.

UPS Ground Freight, Inc., slip op. at 7 (Miscimarra, dissenting)(emphasis added); *see also, e.g., L-3 Communications Eotech, Inc. v. U.S.*, 83 Fed. Cl. 643, 651 (2008)("cumulative effect" of procurement errors invalidates Army competitive

range determination: "If these procurement procedures were allowed to stand, the Army's upcoming 'best value' decision would be fundamentally flawed, arbitrary and capricious, and would not reflect full and open competition").

Chairman Miscimarra did not even completely catalogue the avalanche of arbitrary and capricious rulings by the ARD. There should be no question that his mishandling of key issues of fact and law, and his zealous adherence to the Final Rule's "speed at all costs" approach to representation cases, seriously harmed UPSF's meaningful participation in this case and interfered with its statutory rights. It also produced a certification of a bargaining unit which may have been generated through supervisory coercion.

CONCLUSION

For the foregoing reasons, and for those set forth in UPSF's Principal Brief, UPSF respectfully requests the Court grant its Petition for Review.

Dated: February 13, 2019

Respectfully submitted,

/s/ Kurt G. Larkin

Kurt G. Larkin, Esq.
HUNTON ANDREWS KURTH LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
klarkin@huntonAK.com
(804) 788-8776

Counsel for Petitioner/Cross-Respondent, UPS Ground Freight, Inc.

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD COUNT LIMITATIONS

I, Kurt G. Larkin, counsel for petitioner and a member of the Bar of this Court, certify pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) that the foregoing Reply Brief of UPS Ground Freight, Inc. is proportionately spaced, has a typeface of 14 points or more, and contains 6,465 words.

Dated: February 13, 2019

/s/ Kurt G. Larkin
Kurt G. Larkin, Esq.

Counsel for Petitioner/Cross-Respondent,
UPS Ground Freight, Inc.

CERTIFICATE OF SERVICE

I, Kurt G. Larkin, counsel for petitioner and a member of the Bar of this Court, certify that on February 13, 2019, I caused a copy of the attached Reply Brief of Petitioner/Cross-Respondent, UPS Ground Freight, Inc., to be filed with the Clerk through the Court's electronic filing system which will send notification of such filing to:

David Habenstreit, Esq.
Kira Vol, Esq.
Eric Weitz, Esq.
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
appellatecourt@nlrb.gov
kira.vol@nlrb.gov
eric.weitz@nlrb.gov

Thomas H. Kohn, Esq.
Markowitz and Richman
123 S. Broad Street, Suite 2020
Philadelphia, PA 19109
tkohn@markowitzandrichman.com

/s/ Kurt G. Larkin

Kurt G. Larkin, Esq.

Counsel for Petitioner/Cross-Respondent, UPS Ground Freight, Inc.